IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 65 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant
Versus
BHARATKUMAR @ BHALIYA - Opponent

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Appearance :
MR.A.J.DESAI, ADDL. PUBLIC PROSECUTOR for Appellant,
None for Opponent,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 22/11/2006

ORAL JUDGMENT

This appeal preferred by the appellant-State for enhancement of sentence arises out of the judgment and order of the learned Additional Sessions Judge,

Bhavnagar passed in Sessions Case No.60 of 1988 on 2nd November, 1992.

2. The respondent-accused came to be charged and found guilty for the offence punishable under Section 27 (i) (b) of the Narcotics Drugs and Psychotropic Substance Act, (hereinafter referred to as the 'Act') and came to be convicted therefor. The learned trial Judge after recording conviction and after hearing the accused on quantum of punishment, sentenced the respondent-accused to undergo rigorous imprisonment for three months and to pay a fine of Rs.500/-, in default, to undergo simple imprisonment for two months.

3. The facts of the case can be stated thus:-

4. It is alleged that accused committed offence punishable under Section 8 read with Section 20 (b) (i) of the N.D.P.S. Act. It is the further case of the prosecution that when the complainant alongwith other Police Officers was on petrolling duty in the village Botad of Dist: Bhavnagar, he got information that one person was selling prohibited substance (ganja) near the

river bank. Thereafter, the two Panchas were called and were apprised of the information. Thereafter, the said person-accused was searched in presence of Panchas and two small packets from the pocket of *Payjama* were found. Both the packets were opened in presence of the Panchas and prima-facie the Panchas as well as the complainant had reached to the conclusion that the muddamal article recovered from the pocket of the accused was prohibited substance (Ganja). The accused person was also found with possession of cash of Rs.174/-. The accused person was asked about the valid pass or permit for possessing the prohibited substance but, he was not having such permit to possess the prohibited substance. Thereafter, the offence was registered and case was investigated. The muddamal seized in presence of Panchas was sent for further analysis to the F.S.L. The report of the F.S.L. clearly indicated that the muddamal article seized from the accused was botanical material of plant cannabis sativa (Ganja). Ultimately, the Investigating Agency, having found sufficient material to connect the accused-respondent with the crime, filed charge-sheet.

5. After considering the evidence led by the prosecution, the Special Court came to a conclusion that the prosecution was successful in establishing charges levelled against the respondent-accused and therefore,

convicted the accused-respondent for the said offence by the impugned judgment dated 2nd November, 1992 passed in Session Case No.60 of 1988.

6. In further statement the accused stated that he had kept the muddamal prohibited substance for his personal consumption and he is holding valid licence to possess poppy straw. But, he had not produced the permission to possess the poppy straw. This aspect, according to learned A.P.P., is not relevant, because the order of conviction was accepted by the accused. Mr.Desai, has further submitted that the point before the Court is regarding quantum of punishment. According to the appellant-State, the quantum of punishment imposed by the learned trial Judge is not sufficient. The trial Court ought to have imposed the maximum punishment prescribed under the law i.e. six months imprisonment and maximum amount of fine.

7. It is relevant to note that initially the accused was charged for graver offence punishable under Section 20 (b) (i) of the Act but, ultimately after completion of trial he was found responsible for lesser offence i.e. offence punishable under Section 27 (i) (b) of the Act. It appears that accused was the victim of consumption of prohibited substance (Ganja). It is also not proper for the Court to assume and presume that the

cash recovered from the pocket of the accused was against the sale of prohibited substance and that he was involved in illicit trafficking or selling of Ganja, for want of cogent and convincing evidence in this regard. Ultimately, 10 gms of Ganja was found from the accused. He was sitting on the river bank. The trial Court has accepted that the accused was serving as 'Poojari' and is a victim of the habit that was developed. Despite the statutory provisions, the accused was not sent to the reformation center so that he can get rid of habit that he had developed. The quantum of three months punishment imposed by the trial Court is more than adequate and even punishment lesser than actually imposed in present case could have been imposed to the accused. When it is accepted by the trial Court that he was the victim of habit of consumption of Ganja, the person who is holding a valid licence to hold, possess or use the poppy straw-one other prohibited substance under the N.D.P.S. Act, and when he is found in possession of only 10 gms then, it can reasonably be believed that he must have kept it for personal consumption and not for any other purpose. As per the Notification published in Gazette of Government of India (Extra

Ordinary Part – II) dated 14th November, 1985 any quantity of Ganja which is less than 500 gms, should be treated as “small quantity” so far as scheme of Section 27 of N.D.P.S. Act is concerned. So the accused was holding prohibited substance in a small quantity and therefore only the maximum punishment prescribed for the purpose is rigorous imprisonment for six months only.

8. It is not the say of the State that punishment imposed by the trial Court is less than minimum prescribed nor there are reasons to show that graver punishment ought to have been imposed. When accused has already undergone the substantive sentence imposed by the trial Court and there is no reference as to any other offence committed by the accused in past, it would not be proper for this Court to enhance the period of punishment after lapse of about 14 years when there is no grave error committed in deciding the actual period of substantive sentence by the trial Court.

9. Before parting with the judgment, it is clarified that at Exh.3 in Charge the quantity of prohibited substance is mentioned as 100 gms., but in

the F.I.R., as well as in the Report of the F.S.L. at Exh.15, the quantity shown as 10 gms (2 packets having about 5 gms of dried greenish vegetable coloured material) and therefore in the judgment also the learned Judge has considered the total quantity as 10 gms. Hence, the same should be considered as typographical error.

10. In the result, I do not find any merits in the present appeal. The appeal preferred the appellant-State for enhancement of the sentence must fail and stands dismissed.

(C.K.BUCH, J.)

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